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Supreme Court, U.S.
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No. 95-1503

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner submits this supplemental brief to inform the Court of recent circuit decisions regarding the issues raised by his petition. With these rulings, the Courts of Appeals have divided as to the constitutionality of the statute at issue and as to the interpretation of this Court's ruling in *New York v. United States*, 505 U.S. 144 (1992).

This case presents the question of whether 18 U.S.C. § 922(s), which commands designated State officials to investigate and approve purchasers of handguns from Federally-licensed firearms dealers, violates the Tenth Amendment and exceeds Commerce Clause powers. The Ninth Circuit, in the ruling from which certiorari is sought, upheld the statute against these challenges.

On March 21, 1996, the Court of Appeals for the Fifth Circuit struck, as violative of the Tenth Amendment, the duties imposed on State officials by 18 U.S.C. § 922(s). *Koog v. United States*, No. 94-50562, 1996 US App. Lexis 5289. In so doing, it expressly rejected the Ninth Circuit's reading of *New York*: "With due respect for our sister circuit and its distinguished panel of judges, we cannot agree." Slip op. at 22.

In the ruling here at issue, the Ninth Circuit interpreted *New York*'s bar on forced "administration" of Federal programs to bar only forced legislation or policy decisions, and held that the statute did not require such. The Fifth Circuit disagreed with both premises. It rejected the enact/enforce distinction, suggesting that this Court's use of "administer" logically covers implementation and

enforcement, *Id.* at 13, n.4, and noting *New York*'s admonition that the Commerce Clause authorizes Federal regulation of commerce, not orders to the States to regulate it. *Id.* at 9. It added that the statute in any event required judgments indistinguishable from policy decisions. *Id.* at 13, n.4, 15-16.

To the extent an enact/enforce distinction could be drawn, the Fifth Circuit sided with Judge Fernandez's Ninth Circuit dissent: coerced enforcement of Federal programs would constitute the *greater* violation of the principles of federalism.

> Congress's bypass of state legislative processes here constitutes a greater incursion into state sovereignty than forcing the States to enact legislation: a bypass disposes of even the pretext of minimal state discretion that is present when the federal government forces a State to employ its legislative processes to achieve a given end.

Slip op. at 19. To the Fifth Circuit, 18 U.S.C. § 922(s) was a violation of the political accountability principles underlying *New York*. State officials must bear the blame for diverting resources, the responsibility for determining what was a "reasonable effort," the anger of rejected buyers, and risk of suit should they err. "For citizens that encounter the palpable consequences of this law, Congress is nowhere to be found." Slip op. at 20.

In contrast, the Second Circuit has rendered an opinion upholding 18 U.S.C. § 922(s) against identical challenges. *Frank v. United States*, No. 95-6019, US App. Lexis 4615 (Mar. 15, 1996). The Second Circuit cited the Ninth in reading *New York* to bar only forced legislation or regulation, not forced execution of Federal programs. Slip

op. at 23-24. "Federalism is too crucial, too central to our system of government to be trivialized by a rule that would make any co-optation of any state official into a violation of the Constitution." *Id.* at 28.

Accountability was not blurred in the Second Circuit's eyes since "the federal government has taken responsibility for determining the applicable standards, and state officials are being asked to apply those standards." *Id.* at 29. The statute was within the commerce power since firearms moved in commerce, and thus State officials could be required to aid in their regulation. *Id.* at 2-3, 24-25. The Second Circuit accordingly upheld 18 U.S.C. § 922(s).

We submit that with these recent decisions the Courts of Appeals have divided on the constitutionality of 18 U.S.C. § 922(s), and on the core meaning of this Court's ruling in *New York*.

Respectfully submitted,

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